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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

THE DENVER UNION STOCK YARD COMPANY,
Petitioner,

v.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner ("Stock Yard Company") prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Tenth Circuit entered on February 15, 1957. This judgment reversed a decision of the Judicial Officer[1] of the United States Department of Agriculture under the

[1] The Judicial Officer acted for the Secretary of Agriculture (10 F.R. 13769; 11 F.R. 177A-233; 18 F.R. 3219, 3648; 19 F.R. 74).

Packers and Stockyards Act, 1921 (42 Stat. 159, as amended, 7 U.S.C. § 181 *et seq.*), in which the Judicial Officer held that a business regulation of the Stock Yard Company, challenged by the respondent ("Association"), is not invalid on its face as a matter of law. In its judgment, the Court below also instructed the Judicial Officer to vacate his order dismissing the Association's complaint and to enter an order requiring the Stock Yard Company to cease and desist from enforcing its regulation.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is printed in Appendix A to this petition, *infra*, pp. 1a-7a, and is reported at 241 F. 2d 192.

The decision and order of the Judicial Officer of the United States Department of Agriculture are reported at 15 Agri. Dec. 638 (1956), and are printed in the record (R. 6-33).

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit (Appendix B., *infra*, p. 8a) was entered on February 15, 1957. The jurisdiction of this Court is invoked under 5 U.S.C. (Supp.) § 1040 and 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Regulation 10(c) of the Stock Yard Company requires all market agencies and dealers who engage in business upon the Stock Yard Company's property to refrain from engaging in specified activities. The following questions are presented:

(1) Did the Court below err in holding that it could assume facts not in the record and, upon such assumptions, declare the company regulation to be invalid and in violation of the statutory duty of the Stock Yard Company to prescribe just, reasonable, and non-discriminatory regulations?

(2) Did the Court below err in deciding that the "full hearing" required by § 310 of the Packers and Stockyards Act (7 U.S.C. § 211) as a condition to a finding of unreasonableness, as applied to a stockyard company regulation, did not require the party complainant to submit evidence to support its claim of unreasonableness?

(3) Did the Court below err in invading the statutory discretion of the Secretary of Agriculture by ordering the Secretary, without any factual record, to issue an order requiring the Stock Yard Company to cease and desist from enforcing its business regulation?

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

Pertinent provisions of the Packers and Stockyards Act (42 Stat. 159, as amended, 7 U.S.C. § 181 *et seq.*) are printed in Appendix C to this Petition, *infra*, pp. 9a-11a.

Regulation 10(c) of the Stock Yard Company is printed in Appendix D to this Petition, *infra*, pp. 11a-12a.

STATEMENT

(1) *The Administrative Proceeding.*—The Association brought this proceeding before the Secretary of Agriculture to secure a cease and desist order re-

straining the Stock Yard Company from enforcing its Regulation 10(c) against the Association. The Association is a "market agency" registered with the Secretary of Agriculture and does business on the "posted" market of the Stock Yard Company at Denver. As a market agency, the Association, acting as agent for the buyer or seller, buys and sells livestock for others on a commission basis.

The Stock Yard Company is required by the Packers and Stockyards Act to establish just, reasonable, and nondiscriminatory regulations in respect to the furnishing of stockyard services (§ 307 of the Act, 7 U.S.C. § 208). Regulation 10(c) was established by the Stock Yard Company in an endeavor to cure abuses of the fiduciary relationship by certain market agencies which tended to prevent the Stock Yard Company and the market agencies from providing reasonable stockyard services to patrons of the Denver market as required by § 304 of the Act (7 U.S.C. § 205).

The Association filed its complaint with the Secretary, contending that Regulation 10(c) is invalid and seeking an order from the Secretary under § 310 of the Act (7 U.S.C. § 211) to require the Stock Yard Company to cease and desist from enforcing its regulation (R. 40-43). The Stock Yard Company filed an answer, admitting the identity of the parties and the issuance of Regulation 10(c), denying all of the other factual allegations and legal conclusions in the complaint, setting forth affirmative defenses, and demanding a hearing on the facts and the law (R. 45-49).

After the case was assigned to a hearing examiner,[2]

[2] Administrative proceedings of this nature are conducted, in the first instance, before a hearing examiner; thereafter, the proceeding is reviewed by the Judicial Officer. See note 1, *supra*.

the Stock Yard Company applied for a subpoena *duces tecum* to examine specified books and records of the Association. The purpose of the subpoena was to secure substantiation of facts already known which showed abuses of fiduciary relationships by the Association (R. 50). The Association opposed such application, contending that no hearing on the facts was necessary, that the challenged regulation is invalid on its face as a matter of law, and that an order should forthwith be entered requiring the Stock Yard Company to cease and desist from enforcing its regulation (R. 55).

But the hearing examiner rejected these contentions (R. 71), holding that the basic question was whether the Stock Yard Company had failed to furnish "reasonable" stockyard services at the Denver stockyards as required by § 304 of the Act (7 U.S.C. § 205), or had set up some "unreasonable regulation" in respect to the furnishing of such stockyard services as prohibited by § 307 of the Act (7 U.S.C. § 208). He further held that "the question of reasonableness depends upon facts, the circumstances surrounding the action taken . . ." (R. 71).

The hearing examiner set a time and place for a hearing to receive evidence and indicated that, if the Association presented a case at the hearing by presenting evidence as to the "unreasonableness" of Regulation 10(c), the subpoena requested by the Stock Yard Company would be issued if the Stock Yard Company then needed the subpoena (R. 72).

Thereupon, the Association filed an "Election to Rest" (R. 73) by which it refused to go to a hearing on the facts or to present evidence in support of its

allegations as to the invalidity of the regulation. The hearing examiner certified the case to the Judicial Officer, recommending that the proceeding be dismissed (R. 74).

After receiving briefs from the parties and listening to oral argument devoted solely to legal questions—there being no facts before him—, the Judicial Officer held that the regulation is related to the furnishing of stockyard services at the Denver stockyard and that it is not unreasonable on its face as a matter of law (R. 6-33). He dismissed the complaint in view of the Association's election not to appear at a hearing upon the facts and present evidence in support of its charge that the regulation is "unreasonable". The Judicial Officer concluded ". . . that § 310 of the Act requires that a 'full hearing' precede a determination by the Secretary that a regulation of a stockyard company for or in connection with the furnishing of stockyard services is unjust, unreasonable, or discriminatory. * * *" (R. 32).

(2) *The Decision of the Court of Appeals.*—The Association brought a proceeding against the United States and the Secretary of Agriculture in the United States Court of Appeals for the Tenth Circuit to secure judicial review of the decision and order of the Judicial Officer (R. 1-5) under the Hobbs Act (64 Stat. 1129, 5 U.S.C. (Supp.) § 1031 *et seq.*). The Stock Yard Company intervened as a respondent as a matter of right. 5 U.S.C. (Supp.) § 1038.

The Court of Appeals reversed the decision of the Judicial Officer, holding that the consideration of evidence was immaterial to the issue to be decided and not necessary to constitute a "full hearing" because,

as applied to hypothetical facts conjectured by the Court, the lower Court declared that the entire regulation is invalid on its face as a matter of law. That Court remanded the case to the Judicial Officer "with instructions" to "vacate the order dismissing" the Association's complaint and to "enter an appropriate order requiring the Denver Union Stock Yard Company to cease and desist from issuing or enforcing its Regulation 10(c)."

REASONS FOR GRANTING THE WRIT

The importance of this case transcends its interest to either the Stock Yard Company or to the Association. The action of the Court below seriously interferes with the obligation of the Stock Yard Company and of more than three hundred and fifty other regulated stockyards to maintain reasonable regulations in respect to the furnishing of stockyard services. At stake, also, is the proper administration of the Packers and Stockyards Act by the Secretary of Agriculture and of other important regulatory statutes by other administrative agencies.

1. The Opinion of the Court Below Is in Direct Conflict With Prior Decisions of This Court Holding That a Full Hearing on the Facts, as Well as the Law, Is an Indispensable Prerequisite to the Issuance of an Order by the Secretary Under § 310 of the Packers and Stockyards Act.

The opinion of the Court below holding that the submission of evidence is not required to constitute a "full hearing" under § 310 of the Packers and Stockyards Act (7 U.S.C. § 211) will have far-reaching adverse consequences upon the Secretary of Agriculture who is charged with the administration of the Act and upon those business organizations subject to regulation under it.

The administrative proceeding instituted before the Secretary upon the Association's complaint was for the sole purpose of determining the reasonableness of the Stock Yard Company's Regulation 10(c) and, if unreasonable, to secure an order compelling the Stock Yard Company to cease and desist from enforcing the regulation. The Stock Yard Company, pursuant to the Rules of Practice (9 C.F.R. § 202.11(a)), requested an oral hearing on the facts (R. 49). The Rules of Practice specify that the term "hearing", under the Packers and Stockyards Act, includes that part of the proceeding which involves the submission of evidence (9 C.F.R. § 202.2(g)). In the administrative proceeding—instituted upon the complaint of the Association—the burden of proof was upon the Association. (§ 7, Administrative Procedure Act, 60 Stat. 241 (1946), as amended, 5 U.S.C. (Supp.) § 1006; *Platt* v. *Lecocq* (8 Cir., 1907), 158 Fed. 723. See, *Louisville & Nashville R. R. Company* v. *United States*, 238 U.S. 1, 11 (1915); *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U.S. 591, 602 (1944), and *Swift & Company* v. *United States*, 343 U.S. 373, 382 (1952)).

But the Association elected not to appear at a hearing on the facts and not to present evidence in support of its charge that Regulation 10(c) is "unreasonable." The Stock Yard Company has always insisted that the Judicial Officer was without authority in law to issue an order requiring the Stock Yard Company to cease and desist from enforcing its regulation in the absence of a "full hearing" both on the relevant facts and the law. The Judicial Officer agreed, dismissing the complaint and holding that a "full hearing" on the facts and the law must precede a determination

that a regulation of a stockyard company in connection with the furnishing of stockyard services is unjust, unreasonable, or discriminatory and that he would not be authorized to set aside a company regulation without evidence that it is unjust, unreasonable, or discriminatory (R. 32).

But the Court of Appeals—rejecting the conclusion of the Judicial Officer on this point—held that "evidence is immaterial to the issue" of the validity of Regulation 10(e) and that the "full hearing" provision of § 310 of the Act had been satisfied by "according the parties the right of argument" on the law.

The holding of the Court below conflicts directly with the decisions of this Court that § 310 of the Act provides, without qualification, that a cease and desist order may be issued only "after full hearing upon a complaint", and that such "hearing" involves the right to submit evidence as well as to make legal argument. *Morgan* v. *United States*, 298 U.S. 468, 480 (1936); *Morgan* v. *United States*, 304 U.S. 1, 15 (1938). See, also, *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U.S. 88, 93 (1913); *Baltimore and Ohio R. Co.* v. *United States*, 277 U.S. 291, 299, 300 (1928); *Shields* v. *Utah Idaho Central R. Co.*, 305 U.S. 177, 182 (1938).

In the first *Morgan* case, this Court said (298 U.S. at page 480):

> "* * * The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. . . . The 'hearing' is the hearing of evidence and argument. * * *"

The Court below thus ignored the decisions of this Court which hold that a "full hearing" on the facts and the law, as provided by § 310 of the Act, is a "rudimentary" procedural requirement which the Congress has explicitly imposed as an indispensable prerequisite to the authority of the Secretary to act. *Morgan* v. *United States*, 304 U.S. 1, 15 (1938). By holding that, without any evidence at all, the Secretary of Agriculture may order a stockyard company to cease and desist from enforcing a properly promulgated business regulation, the Court of Appeals has denied this Stock Yard Company the right to defend its challenged regulation in the manner provided by the Congress. This will adversely affect all of the businesses regulated by the Packers and Stockyards Act, and it will also seriously interfere with the settled practice which has been followed by the Secretary in administering the Act.

2. The Regulation Must be Tested in the Light of Its "Reasonableness" Which Involves a Factual Inquiry, and the Court Below Erred in Reversing the Judicial Officer's Decision That Evidence Is Essential to Such a Test.

The Court of Appeals erred in holding, as a matter of law, that the challenged regulation "bears no reasonable relationship to the duties required of the stockyard company under the provision of the Packers and Stockyards Act", and that it was unnecessary to consider evidence on the issue as to the "reasonableness" of the regulation and of its relation to the furnishing of stockyard services at the Denver stockyard.

Under the Act, the validity of Regulation 10(c) depends upon whether it is a "just, reasonable, and nondiscriminatory" regulation in respect to the furnishing of reasonable stockyard services at the Denver

stockyard, §§ 304 and 307 of the Act (7 U.S.C. §§ 205, 208). The Stock Yard Company is required, under § 304 of the Act, only "to furnish upon reasonable request, without discrimination, reasonable stockyard services. . . ."

Regulation 10(c) imposes conditions upon which market agencies, dealers,[3] and others will continue to receive stockyard services at the Denver stockyard from the Stock Yard Company. Much of the buying and selling of livestock at the Denver stockyard is performed by market agencies, as agents on a commission basis, or by dealers. It is the position of the Stock Yard Company—set forth in its answer in the administrative proceeding (R. 45)—that, if the registered market agencies and dealers engage in the activities prohibited by Regulation 10(c), the patrons of the Denver stockyard, whose agents buy and sell their livestock at the Denver market, will not receive the reasonable stockyard services at that market to which they are entitled; and, further, that, by registering, a market agency undertakes to perform certain public and fiduciary functions for its patrons at Denver and, thereby, disenables itself from the right to engage in the conflicting and inconsistent activities proscribed by the regulation. Regulation 10(c) was designed to promote the furnishing of reasonable stockyard services at the Denver market by restraining the market agencies and dealers registered at Denver from soliciting business for markets other than Denver, from diverting livestock from the Denver

[3] No dealer has challenged the regulation. A "dealer" is any person other than a "market agency" who buys and sells livestock at a posted stockyard either on his own account or as agent or employee of another. § 301(d), 7 U.S.C. § 201(d).

market, or from engaging in other acts and practices designed to interfere with the normal movement of livestock to the Denver stockyard. The Stock Yard Company was prepared to show the evils at which this regulation was aimed.

The Judicial Officer correctly held that the challenged regulation is "* * * Certainly a regulation . . . in respect to the furnishing of stockyard services" (R. 19), since it is plainly a regulation which places limitations upon ". . . the continued rendering of stockyard services . . ." at the Denver stockyard. Further, he held that the regulation is not "unreasonable" on its face as a matter of law. The lower Court overruled the Judicial Officer on both points, concluding that the regulation " . . . bears no reasonable relationship to the duties required of the stockyard company under the provision of the Packers and Stockyards Act".

But, in this case, there was no evidence as to what stockyard services are rendered at the Denver market, as to who renders these services, as to how the services rendered at the Denver stockyard differ, if any, from similar services rendered at other regulated stockyards, or as to the effect of Regulation 10(c) on the rendition of stockyard services at the Denver market. The record before the Court below was devoid of ". . . facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable . . .", *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918).

The Court below, without knowing any facts about the regulated business, the evils to be cured, or the

way in which the regulation will affect the market agencies at the Denver market, determined that there could be no possible factual situation in which any part of the regulation could be lawful. But the Court of Appeals, itself, stated that the question for determination by it was whether Regulation 10(c) "... has any possible lawful application ...", and the Judicial Officer, being informed by experience of the manner in which regulated stockyards and market agencies operate, said that he was unable to hold that there was no possible factual situation in which the regulation would be reasonable.

The Court below—knowing nothing of the problems involved—also held that it was of "no legal significance", even "if proved to be soundly based in fact", that the ability of the patrons of the Denver stockyard to receive efficient stockyard services would be adversely affected if the market agencies engaged in the activities prohibited by Regulation 10(c). But, here again, the Judicial Officer held otherwise, declaring it could not be said that such facts would have no "material bearing" on the validity of Regulation 10(c). (R. 28)

The Judicial Officer's conclusions were entitled to respect, and the Court below was unwarranted in rejecting them and substituting its judgment for that of the Judicial Officer. *Tagg Bros. & Moorehead* v. *United States*, 280 U.S. 420, 442-445 (1930); *St. Joseph Stock Yards Company* v. *United States*, 298 U.S. 38, 51 (1936); *Acker* v. *United States*, 298 U.S. 426, 433-434 (1936); *United States* v. *Morgan*, 313 U.S. 409, 417 (1941). See *Gray* v. *Powell*, 314 U.S. 402, 411-413 (1941); *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 131 (1944); *Securities*

& Exchange Comm'n v. *Central Illinois Corp.*, 338 U.S. 96, 127 (1949). Even the decisions of the Judicial Officer as to pure matters of law were entitled to great weight by the Court below. See, *Levinson* v. *Spector Motor Company*, 330 U.S. 649, 672 (1947).

Further, in holding that it was unnecessary to consider evidence on the issue of the "reasonableness" of the challenged regulation, the Court of Appeals ignored the decisions of this Court and of other federal courts which hold that application of a standard of "reasonableness" involves a factual inquiry and an intimate understanding of the technical problems of the industry concerned, since "reasonableness" is necessarily a condition which involves factors of relation and degree and can not be resolved except by scrutiny of all pertinent facts in each case. *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918); *Standard Oil Company* v. *United States*, 283 U.S. 163, 179 (1931); *Sugar Institute* v. *United States*, 297 U.S. 553, 600 (1936). "Unreasonableness is not made out by mere assertion. * * *", *Swift & Company* v. *United States*, 343 U.S. 373, 383 (1952). Neither may the "unreasonableness" of Regulation 10(c) be determined by application of any fixed rule of law or precise formula (Cf., *Swift & Company* v. *United States*, 316 U.S. 216, 225 (1942)), because the standard of "reasonableness" imposed by the Packers and Stockyards Act has a color and content that may vary with the different factual settings to which the standard is to be applied. Cf., *First National Bank* v. *Beach*, 301 U.S. 435, 438 (1937).

In *Kelley* v. *Union Stockyard and Transit Company* (C.C.A. 7, 1951), 190 F. 2d 860, 864, the Court of Appeals for the Seventh Circuit held that an issue as

to the alleged "unreasonableness" of action taken by a stockyard owner, in the furnishing of stockyard services, is essentially one of fact and discretion in technical matters and is "factual rather than legal". Accord, *United States* v. *Brown* (D.C. W.D. Okla., 1925), 4 F. 2d 270, 271. See also, *United States* v. *Western Pacific R. Co.*, 352 U.S. 59 (1956).[4]

Thus, the Court of Appeals erred in failing to apply the standard of "reasonableness" to the contested regulation in the manner provided by the Act and in overstepping the proper bounds of its function as a reviewing court. The consequences of its error will not be confined to this case, since it represents a departure from fixed principles and upsets the settled procedure by which the Packers and Stockyards Act has been administered by the Secretary.

3. The Opinion of the Court Below Conflicts With Prior Decisions of This Court Holding That a Regulation Should Not be Declared Invalid by the Courts on the Basis of Assumed or Hypothetical Facts.

The Court of Appeals committed fundamental error in holding Regulation 10(c) invalid as a matter of law on the theory that the regulation would be invalid as applied to hypothetical facts not in the record and never considered by the Judicial Officer. Thus, the Court of Appeals held that the challenged regulation "... is in immediate conflict with the requirement of Section 304

[4] In *Stafford* v. *Wallace*, 258 U.S. 495, 522, 523 (1922), this Court pointed out the close analogy between the Packers and Stockyards Act and the Interstate Commerce Act (49 U.S.C. § 1 *et seq.*). It has uniformly been held by this Court, under the latter act, that questions as to the "reasonableness" of rates, practices, and regulations of carriers depend upon an appreciation of all the facts and circumstances in each case. *Swayne & Hoyt* v. *United States*, 300 U.S. 297, 304 (1937).

which contemplates and imposes the duty upon marketing agencies to render reasonable stockyard services to its [sic] customers at *every* stockyard where they do business. * * *" (Emphasis by the Court). The lower Court conjectured and concluded that such a "conflict" would exist if the regulation were applied to the following factual situation assumed by it:

> "If by rendering reasonable services for a Colorado customer at one stockyard a marketing agency is prohibited from rendering reasonable service for the same or a different Colorado customer at another stockyard, it is apparent that the agency can not perform its statutory duty in one regard or another."

But there was no evidence before the Court of Appeals that the Association or any of the market agencies operating at the Denver stockyard—or anyone else affected by Regulation 10(*e*)—is engaged, or has engaged, in furnishing stockyard services to different Colorado customers in the manner assumed by that Court in the foregoing hypothesis. The Court below even assumed that the stockyard services which would be rendered to the different Colorado customers, at different stockyards, could be "reasonable" in the case of both hypothetical customers. The lower Court thus indulged in an hypothesis upon an hypothesis. It ignored the circumstance that, upon the basis of a factual record, it might be properly concluded that a given market agency could not render "reasonable" stockyard services at more than one stockyard.

This Court has warned, with regard to proceedings under § 310 of the Packers and Stockyards Act, that "* * * Nothing can be treated as evidence which is not introduced as such ... Facts and circumstances

must not be considered which should not legally influence the conclusion. * * *", *Morgan* v. *United States*, 298 U.S. 468, 480 (1936); and in *Associated Press* v. *Labor Board*, 301 U.S. 103, 132 (1937), this Court declared that "* * * Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances." See, *Electric Bond and Share Company* v. *Securities & Exchange Comm'n*, 303 U.S. 416, 443 (1938); *Chicago Board of Trade* v. *Olson*, 262 U.S. 1, 42 (1923). Here, as in *First National Bank* v. *Beach*, 301 U.S. 435, 438 (1937), it may be said that "* * * Hypothetical situations are laid before us and the argument is pressed that the definition will breed absurdity if applied to this one of them or that. We refuse to be led away from the limitations of the concrete case. * * *"

Moreover, because it felt that the regulation would be invalid in a single hypothetical situation with reference to a market agency, the Court of Appeals struck down the entire regulation, which applies not only to market agencies but also to dealers who have not attacked the regulation, and to situations in which regulation by stockyard owners has been held valid.[5] Thus, the effect of the action by the Court below is "... to bar all regulation by [holding] that regulation in a situation not presented would be invalid. * * *". *Associated Press* v. *Labor Board*, 301 U.S. 103, 132 (1937).

[5] For example, Regulation 10(e), *inter alia*, prohibits persons on the property of the Stock Yard Company from soliciting business for other markets or from interfering with consigned livestock received at the market. Such a prohibition has been held valid. *Fort Worth Stockyards Co.* v. *Brown*, 161 S.W. 2d 549 (Texas Civ. App. 1942).

Accentuating its error in holding Regulation 10(e) invalid as applied to the lower Court's hypothetical situation involving a market agency, the Court below made other factual assumptions devoid of evidential support and in the absence of any findings by the Judicial Officer regarding such matters. Thus, the Court held that the sole purpose of the regulation was to safeguard the economic interests of the Stock Yard Company and that the regulation "wounds the public interest". The first of these conclusions is in direct conflict with the uncontradicted allegations of the Stock Yard Company in its answer (R. 45) that the origin of the contested regulation—as well as its purpose—was embedded in the duty of the Stock Yard Company to maintain reasonable regulations in respect to the furnishing of stockyard services as required by §307 of the Act; and neither of these factual conclusions were the subject of findings by the Judicial Officer. Further, with regard to the second of these factual conclusions, this Court has held that, under the Packers and Stockyards Act "... the Secretary is the guardian of the public interest in regulating a business of public concern ...", *United States* v. *Morgan*, 313 U.S. 409, 417 (1941). Until the Secretary has found that a regulation "wounds the public interest", or is contrary to the public policy embedded in the Packers and Stockyards Act, "... the fact can not be said to exist and meantime it is not subject to judicial inquiry and proof. * * *", *United States* v. *Brown*, D.C. W.D. Okla. (1925), 4 F. 2d 270, 271. The courts are not the arbiters of the paramount public interest, because this is the business of the Secretary "made such by the very terms of the statute" (Cf., *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 535, 536 (1946).

If, for no other reason, an appropriate regard for the primary jurisdiction doctrine made it improper for the Court below to assume the foregoing facts and hypothetical situations and to pass judgment upon the validity of Regulation 10(c) based on the Court's conception of such assumptions in the absence of findings by the Judicial Officer with regard to them. *United States* v. *Western Pacific R. Co.*, 352 U.S. 59 (1956).

4. The Lower Court's Opinion Disregards Settled Principles of Administrative Law and Will Adversely Affect the Administration of the Packers and Stockyards Act and Similar Statutes.

(A) The Court of Appeals invaded the discretionary area conferred by the Congress exclusively upon the Secretary of Agriculture. The judgment of the Court below directs the Judicial Officer "... to vacate the order dismissing [the Association's] complaint and enter an appropriate order requiring the Denver Union Stockyard Company to cease and desist from issuing or enforcing its Regulation 10(c)". But that Court had no authority to impose such directions upon the Judicial Officer even if he had erred in dismissing the complaint filed by the Association. The authority of the reviewing court is limited by the Hobbs Act (5 U.S.C. (Supp.) § 1032) to an order "... to enjoin, set aside, suspend (in whole or in part) or to determine the validity of" the final order of the Judicial Officer. That final order in this proceeding was the order dismissing the Association's complaint.

Had the Judicial Officer decided, even after a full hearing, that Regulation 10(c) was invalid as applied to the Association, he would have had several discretionary courses open to him. He could "determine and

prescribe what will be the just and reasonable ... regulation ... to be thereafter followed." He, at his discretion, could have issued an order that the Stock Yard Company should "cease and desist from such violation", and that order could be, again in the Judicial Officer's discretion, limited "to the extent to which the Secretary finds" that such violation "does or will exist." § 310 of the Act, 7 U.S.C. § 211. But the Court below preempted to itself all of this discretionary authority.

This Court has made it clear that, in reviewing the actions of administrative agencies for errors of law, the reviewing courts have no authority to " ... foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge. * * *", *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U.S. 134, 145 (1940). If, indeed, the Judicial Officer had committed an error of law, the only appropriate judgment would have been to direct the Judicial Officer " ... to proceed within the framework of [his] own discretionary authority on the indicated correct principles. * * *." *Rochester Telephone Corporation* v. *United States*, 307 U.S. 125, 136 (1939). See, *Securities and Exchange Comm'n* v. *Chenery Corp.*, 332 U.S. 194, 200-201 (1947); *Ford Motor Co.* v. *Labor Board*, 305 U.S. 364, 374 (1939); and *Federal Radio Comm'n* v. *Nelson Bros. Company*, 289 U.S., 266, 278 (1933).

(B) Unless corrected, the action of the court below will also have an adverse impact upon other regulatory statutes. The standard of "reasonableness" embedded in the Packers and Stockyards Act is indicative of standards of a similar nature found in a host of other important regulatory statutes conferring discretionary

authority on administrative officials. See, *Administrative Justice and the Role of Discretion*, Cooper, 47 Yale Law Journal 577-582 (1938). Of particular concern is the fact that final orders of a number of Federal agencies are also subject to review by the courts of appeals under the same provisions of the Hobbs Act which govern review in this proceeding (5 U.S.C. (Supp.) § 1031 *et seq.*), among these being the Federal Communications Commission, the United States Maritime Commission, and the Atomic Energy Commission.

CONCLUSION

It is apparent that this case involves questions of importance to the livestock industry, to other regulated industries, and to the administration of the Packers and Stockyards Act and other regulatory statutes. The opinion and judgment of the Court below are in conflict with numerous decisions of this Court respecting the appropriate functions of courts reviewing the orders of administrative agencies, and the effect of the errors of the Court of Appeals is not isolated to this case. Accordingly, this petition for certiorari should be granted.

Respectfully submitted,

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